

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARYL LEE SCHEIB,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:14-CV-00337-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF Nos. 14, 15. Attorney David L. Lybbert represents Daryl L. Scheib (Plaintiff); Special Assistant United States Attorney Christopher J. Brackett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on February 14, 2011, alleging disability since February 27, 2005.¹ Tr. 19. The application was denied initially and upon reconsideration. Tr. 159-66, 170-72. Administrative Law Judge (ALJ) R.J. Payne held a video hearing on April 11,

¹At the hearing, Plaintiff's counsel amended the onset date to February 14, 2011, the application date. Tr. 70.

1 2013, Tr. 68-109, at which Plaintiff, represented by counsel, testified as did
2 medical experts Anthony Francis, M.D., and Joseph Cools, Ph.D. The ALJ issued
3 an unfavorable decision on April 26, 2013. Tr. 16-33. The Appeals Council
4 denied review. Tr. 1-4. The ALJ's April 2013 decision became the final decision
5 of the Commissioner, which is appealable to the district court pursuant to 42
6 U.S.C. § 405(g). Plaintiff filed this action for judicial review on October 15, 2014.
7 ECF Nos. 1, 3.

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized
11 here.

12 Plaintiff was 54 years old at the time of the hearing. Tr. 90. Plaintiff
13 attended Central Washington University and graduated with a B.S. in business
14 administration in March 2000. Tr. 91. Prior to attending college, Plaintiff worked
15 as a construction laborer, heavy equipment operator, farm hand, and handyman.
16 Tr. 91. After college, Plaintiff did office work for H&R Block and A to Z
17 Business Consulting. Tr. 91.

18 Plaintiff testified that he is depressed and does not like to be around other
19 people. Tr. 90-91. Plaintiff testified that he experiences pain in his lower back,
20 which extends up to his shoulder blades and neck and down to his hips and legs.
21 Tr. 93. Plaintiff usually takes Tylenol to alleviate his pain, but takes Aleve or
22 Ibuprofen when his fibromyalgia flares up. Tr. 93. Plaintiff does not take
23 prescription pain medicine. Tr. 95. Plaintiff has seen a mental health counselor for
24 anger issues; Plaintiff believes his anger stems from his depression. Tr. 95-96.
25 Plaintiff testified that, when he is depressed, he will sometimes forget to feed or
26 walk his dog, forget to bathe, and not do laundry or clean his room. Tr. 96-97.
27 Plaintiff stated that he would likely miss two to four days of work a week on
28 account of being emotionally despondent. Tr. 102-03. Plaintiff testified that the

1 primary reason he can't work is because of anxiety and panic attacks. Tr. 104.

2 Plaintiff can do some household chores, but doing chores typically makes
3 his pain worse. Tr. 94. Plaintiff testified that he can sit for approximately twenty
4 to thirty minutes at a time and could maybe sit for four hours in an eight-hour day.
5 Tr. 98. Plaintiff has trouble standing, can walk two to three blocks before needing
6 a break, and cannot twist or bend. Tr. 99. Plaintiff stated that he could work an
7 eight-hour day doing work that involved bending, twisting, crouching, and working
8 with his arms outstretched, but such work would immobilize him for three
9 subsequent days. Tr. 100. Plaintiff can lift ten to twenty pounds without
10 aggravating his symptoms. Tr. 101.

11 Plaintiff spends most of his days propped up in his bed. Tr. 102. Plaintiff
12 goes to church on Sundays and will sometimes go fishing for two to three hours at
13 a time. Tr. 105-06.

14 **STANDARD OF REVIEW**

15 The ALJ is responsible for determining credibility, resolving conflicts in
16 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
17 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
18 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
19 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
20 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
21 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
22 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
23 another way, substantial evidence is such relevant evidence as a reasonable mind
24 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
25 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
26 interpretation, the court may not substitute its judgment for that of the ALJ.
27 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
28 evidence will still be set aside if the proper legal standards were not applied in

weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon claimants to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once claimants establish that physical or mental impairments prevent them from engaging in their previous occupations. 20 C.F.R. § 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimants can make an adjustment to other work, and (2) specific jobs exist in the national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(i-v).

ADMINISTRATIVE DECISION

On April 26, 2013, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since February 14, 2011, the amended alleged onset date. Tr. 21.

At step two, the ALJ determined Plaintiff had the following severe impairments: chronic pain due to fibromyalgia and degenerative disk disease; right shoulder impingement status post surgery; osteoarthritis of the right hand; affective disorder; anxiety-related disorder; and personality disorder. Tr. 21.

1 At step three, the ALJ found Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled the severity of one of
3 the listed impairments. Tr. 26. The ALJ assessed Plaintiff's residual function
4 capacity (RFC) and determined he could perform light work subject to the
5 following:

6 He has some limitations with use of the right upper extremity, with no
7 more than frequent pushing and/or pulling; no more than occasional
8 overhead reaching; and no more than frequent handling and fingering
9 with the right hand. He can frequently climb ramps or stairs, but no
10 climbing ladders, ropes, or scaffolds. He can occasionally stoop or
11 crawl, and frequently kneel or crouch. He should avoid concentrated
12 exposure to extreme cold, vibration, or hazards such as machinery and
13 heights. He has a moderate limitation in the ability to maintain
14 attention and concentration for extended periods. He has no more
15 than mild limitations in the ability to understand, remember, and carry
16 out detailed instructions; work in coordination or proximity to others
17 without being distracted by them; complete a normal workday and
18 workweek without interruptions from psychologically based
19 symptoms and to perform at a consistent pace without an
20 unreasonable number and length of rest periods; interact appropriately
21 with the general public; accept instructions and respond appropriately
22 to criticism from supervisors; and respond appropriately to changes in
23 the work setting.

24 Tr. 27 (footnotes omitted).

25 At step four, the ALJ concluded that Plaintiff was able to perform his past
26 relevant work as an office assistant. Tr. 31.

27 Alternatively, at step five, the ALJ determined that, considering Plaintiff's
28 age, education, work experience, and RFC, there were other jobs that exist in
significant numbers in the national economy Plaintiff could perform. Tr. 31-32.
The ALJ did not specify any jobs, but suggested that Plaintiff was capable of most
light work. Tr. 32.

The ALJ thus concluded Plaintiff was not under a disability within the
meaning of the Social Security Act at any time from February 14, 2011, through

1 the date of the ALJ's decision. Tr. 32.

2 ISSUES

3 The question presented is whether substantial evidence supports the ALJ's
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) rejecting the opinions of
6 Plaintiff's treating and examining medical providers; (2) failing to conduct an
7 adequate step four analysis; and, (3) failing, at step five, to identify specific jobs,
8 available in significant numbers, which Plaintiff could perform given his functional
9 limitations.

10 DISCUSSION

11 A. Evaluation of Medical Evidence

12 Plaintiff argues the ALJ failed to accord adequate weight to the medical
13 opinions of Plaintiff's treating and examining sources, including Drs. Thompson,
14 Burdge, Duris, and Mr. Hoyer. ECF No. 14 at 10-17.

15 "In making a determination of disability, the ALJ must develop the record
16 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barhart*, 341 F.3d
17 1006, 1012 (9th Cir. 2003).

18 In weighing medical source opinions, the ALJ should distinguish between
19 three different types of physicians: (1) treating physicians, who actually treat the
20 claimant; (2) examining physicians, who examine but do not treat the claimant;
21 and, (3) nonexamining physicians who neither treat nor examine the claimant.
22 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
23 weight to the opinion of a treating physician than to the opinion of an examining
24 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
25 more weight to the opinion of an examining physician than to the opinion of a
26 nonexamining physician. *Id.*

27 When a physician's opinion is not contradicted by another physician, the
28 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*

1 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is
2 contradicted by another physician, the ALJ is only required to provide "specific
3 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*
4 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

5 The ALJ gave weight to the opinions of the consulting medical experts, Drs.
6 Francis and Cools, who concluded that Plaintiff was not disabled from either
7 physical or mental impairments. To the extent that Plaintiff's treating and
8 examining providers found to the contrary, the ALJ was only required to provide
9 specific and legitimate reasons for rejecting such opinions.

10 **1. Kristy Thompson, DO**

11 Dr. Thompson was Plaintiff's primary care physician. Dr. Thompson
12 completed a physical evaluation of Plaintiff on March 1, 2010. Tr. 362-66. Dr.
13 Thompson diagnosed Plaintiff with chronic pain (mostly in his back) and
14 fibromyalgia, bipolar disorder, and past polysubstance abuse. Tr. 364. Dr.
15 Thompson found (1) Plaintiff's chronic pain and fibromyalgia caused moderate
16 limitations in his ability to sit, stand, walk, lift, and carry, (2) Plaintiff's bipolar
17 disorder caused moderate limitations in his ability to communicate and
18 understand/follow directions, and (3) Plaintiff's history of polysubstance abuse
19 caused marked limitations in his ability to communicate and understand/follow
20 directions. Dr. Thompson found Plaintiff had restrictions in mobility, agility, and
21 flexibility. Tr. 365. Dr. Thompson opined that Plaintiff was limited to sedentary
22 work. Tr. 365.

23 Dr. Thompson completed a second physical evaluation of Plaintiff on
24 February 4, 2011. Tr. 351-55. Dr. Thompson diagnosed Plaintiff with chronic
25 back pain, right shoulder pain, and depression. Tr. 353. Dr. Thompson
26 documented the treatment Plaintiff underwent to address his back pain, noting that
27 Plaintiff's shoulder pain was "much improved" after his surgery in December 2010
28 and observing that Plaintiff's depression was "stable." Tr. 353. Dr. Thompson

1 found (1) Plaintiff's chronic pain caused moderate limitations in his ability to sit,
2 stand, walk, lift, handle, and carry, (2) Plaintiff's right shoulder pain caused mild
3 limitations in his ability to lift, handle, and carry, and (3) Plaintiff's depression
4 caused mild limitation in his ability to understand and follow directions. Tr. 354.
5 Dr. Thompson found Plaintiff had restrictions in mobility, agility, and flexibility.
6 Tr. 354. Dr. Thompson opined that Plaintiff was limited to sedentary work. Tr.
7 354.

8 In subsequent progress reports, Dr. Thompson continued to opine that
9 Plaintiff's physical impairments limited him to sedentary work. *See* Tr. 459 (dated
10 August 16, 2011), Tr. 466 (dated January 25, 2012).²

11 The ALJ gave little weight to Dr. Thompson's opinion that Plaintiff was

13 ²The ALJ interpreted Dr. Thompson's January 2012 DSHS progress report
14 as finding that Plaintiff was capable of light exertion. Tr. 29-30 (citing Tr. 463).
15 The Court disagrees with the ALJ's interpretation of this report.

16 It is not entirely clear what portion of the document at Tr. 463 is merely the
17 printed form, and what portion is case-specific language contributed by Dr.
18 Thompson. The form requires the medical provider to "[c]heck boxes describing
19 activities the patient is physically capable of doing." Tr. 463. In the relevant
20 section, the only box checked by Dr. Thompson is the limitation that "[t]he patient
21 can sit for most of the day; walking or standing for brief periods." Tr. 463. This is
22 consistent with Dr. Thompson's opinion at the end of the document that Plaintiff
23 was capable of sedentary work. Tr. 466. Given that Dr. Thompson specifically
24 found Plaintiff capable of sedentary work, Tr. 466, and that she further indicated
25 that Plaintiff "can sit for most of the day; walking or standing for brief periods,"
26 Tr. 463, any inconsistency regarding Plaintiff's exertional limitations would appear
27 to be inadvertent. Consistent with her other opinions, Dr. Thompson clearly
28 thought Plaintiff was only capable of sedentary work.

1 limited to sedentary work. Tr. 29. The ALJ reasoned that these opinions were not
 2 supported by Dr. Thompson's objective findings from her physical exams of
 3 Plaintiff where Dr. Thompson found "diffuse tenderness to palpation of the
 4 thoracic and lumbosacral spine, . . . decreased range of motion, normal sensation
 5 and strength, and . . . able to walk without a limp." Tr. 29; *see* Tr. 353, 364, 459,
 6 466.

7 The ALJ provided specific and legitimate reasons for giving little weight to
 8 Dr. Thompson's opinions. As noted by the ALJ, Dr. Thompson's physical exams
 9 of Plaintiff revealed minimal objective findings. *See* Tr. 353, 364, 459, 466. An
 10 ALJ may reject a medical opinion that is "inadequately supported by clinical
 11 findings." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). Furthermore,
 12 the lack of objective findings is internally inconsistent with Dr. Thompson's
 13 opinion that Plaintiff is limited to sedentary work, which is another valid reason to
 14 give the opinion less weight. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
 15 2005). Although Plaintiff's interpretation of Dr. Thompson's opinions to support
 16 greater limitations is not unreasonable, the Court will not reverse the ALJ's
 17 findings when the evidence is susceptible to more than one interpretation. *Tackett*,
 18 180 F.3d at 1097.

19 **2. Aaron R. Burdge, Ph.D.**

20 Dr. Burdge completed a psychological evaluation of Plaintiff on March 7,
 21 2012. Tr. 468-78. Dr. Burdge diagnosed Plaintiff with several mental
 22 impairments including depressive disorder, NOS (chronic pain); anxiety disorder,
 23 NOS (with generalized and panic features); pain disorder associated with a general
 24 medical condition (back, per self-report); and, personality disorder, NOS (with
 25 antisocial features). Tr. 473. Despite earlier diagnoses, Dr. Burdge stated that he
 26 did not believe Plaintiff met the criteria for bipolar disorder. Tr. 473. Dr. Burdge
 27 opined that Plaintiff's prognosis was "guarded" and Plaintiff would be "unlikely to
 28 function adequately in a work setting until his psychological symptoms have been

1 managed more effectively.” Tr. 473. Dr. Burdge recommended Plaintiff take part
2 in cognitive behavioral therapy and pain management instruction. Tr. 474. In
3 areas of cognitive and social functioning, Dr. Burdge found Plaintiff mostly had no
4 limitations, but some mild limitations, and moderate limitations in his ability to
5 maintain appropriate behavior in a work setting and in his ability to complete a
6 normal workday and workweek without interruptions from psychologically based
7 symptoms. Tr. 474.

8 The ALJ gave “no weight” to Dr. Burdge’s opinions. Tr. 31. The ALJ
9 noted that Dr. Burdge’s opinions were contradicted by contemporary treatment
10 records noting that Plaintiff’s condition was stable and he reported being okay. Tr.
11 31 (citing Tr. 285, 353, 397, 399, 448). The ALJ reasoned that Dr. Burdge’s
12 opinion was based on Plaintiff’s presentation in a “one-time evaluation specifically
13 for the purpose of obtaining benefits.” Tr. 31. The ALJ found Dr. Burdge’s
14 assessment of moderate limitations inconsistent with the opinions of Dr. Cools and
15 unsupported by the longitudinal record. Tr. 31.

16 The ALJ did not give specific and legitimate reasons for rejecting Dr.
17 Burdge’s opinions. Plaintiff’s contradictory statements identified by the ALJ were
18 mostly made by Plaintiff over a year prior to his presentation to Dr. Burdge in
19 March 2012. *See* Tr. 285 (February 2011), 353 (February 2011), 397 (May 2011),
20 399 (February 2011), 448 (July 2011 (citing past reports)). The ALJ also erred in
21 using the fact that Plaintiff sought the evaluation for purpose of obtaining benefits
22 as a reason to discount Dr. Burdge’s opinion. *See Lester*, 81 F.3d at 832 (“[T]he
23 purpose for which medical reports are obtained does not provide a legitimate basis
24 for rejecting them.”). The fact that Dr. Cools, the consulting medical expert,
25 disagreed with Dr. Burdge’s assessments does not constitute substantial evidence
26 to reject Dr. Burdge’s opinions. *See Lester*, 81 F.3d at 831 (The ALJ may give
27 weight to consulting opinions “only insofar as they are supported by evidence in
28 the case record.”). Finally, the ALJ’s conclusion that the limitations assessed by

1 Dr. Burdge are not supported by the record is not accurate. In formulating
2 Plaintiff's mental RFC, reviewing sources Sean Mee, Ph.D., and Jerry Gardner,
3 Ph.D., both found Plaintiff was moderately limited in his ability to (1) complete a
4 normal workday and workweek without interruptions from psychologically based
5 symptoms and to perform at a consistent pace without an unreasonable number and
6 length of rest periods, (2) interact appropriately with the general public, and (3) get
7 along with coworkers or peers without distracting them or exhibiting behavioral
8 extremes. Tr. 136, 153. These limitations are largely consistent with the moderate
9 limitations assessed by Dr. Burdge.

10 On remand, the ALJ should incorporate into his RFC determination Dr.
11 Burdge's opinion that Plaintiff is moderately limited in his ability to maintain
12 appropriate behavior in a work setting and in his ability to complete a normal
13 workday and workweek without interruptions from psychologically based
14 symptoms. The ALJ should include these limitations in his hypothetical
15 question(s) to the vocational expert (VE).

16 **3. Mark Duris, Ph.D.**

17 Dr. Duris completed a psychological/psychiatric evaluation of Plaintiff on
18 February 12, 2011. Tr. 344-50. Dr. Duris noted that Plaintiff's primary mental
19 disorders were depression/anxiety and psychosis. Tr. 346. Dr. Duris stated that
20 Plaintiff's "[d]epression and anxiety do not appear to keep [Plaintiff] from having
21 sufficient energy, motivation, and concentration to function in a work environment
22 at this time." Tr. 346. Dr. Duris further diagnosed Plaintiff with "Bipolar II
23 Disorder Major Depressive and Hypomanic Episodes (controlled with
24 medication)" and a number of substance abuse disorders in remission. Tr. 347.
25 Dr. Duris assessed mostly mild functional limitations but found Plaintiff
26 moderately limited in his ability to communicate and perform effectively in a work
27 setting with public contact and markedly limited in his ability to maintain
28 appropriate behavior in a work setting and to communicate and perform effectively

1 in a work setting with limited public contact. Tr. 347-48. Dr. Duris noted that
2 Plaintiff's medication improved his ability to function in a work environment. Tr.
3 348. Dr. Duris opined that Plaintiff's limitations would not last longer than six
4 months. Tr. 348.

5 Dr. Duris completed a second psychological/psychiatric evaluation of
6 Plaintiff on July 19, 2011. Tr. 448-55. Dr. Duris found that Plaintiff was
7 "relatively stable mental health wise." Tr. 448. Dr. Duris' diagnoses and
8 observations were similar to those contained in his February 2011 evaluation. Tr.
9 451. Dr. Duris stated that Plaintiff depression "does not keep [Plaintiff] from
10 having sufficient coping resources, energy, motivation, and concentration to
11 function in a work environment at this time." Tr. 451. Dr. Duris assessed mostly
12 mild functional limitations, but found Plaintiff moderately limited in his ability to
13 understand, remember, and persist in tasks following complex instructions and to
14 communicate and perform effectively in a work setting with public contact. Tr.
15 452. Dr. Duris concluded, "[Plaintiff] may be able to function in an entry-level
16 work position with accommodation by the employer for mood and behavioral
17 related symptoms." Tr. 452.

18 The ALJ gave no weight to Dr. Duris' February 2011 evaluation in which
19 Dr. Duris assessed numerous moderate and marked cognitive limitations. Tr. 30-
20 31 (citing Tr. 347-48). The ALJ found Dr. Duris' opinions contradicted by
21 contemporary records and noted that Dr. Duris found that Plaintiff's symptoms
22 were controlled by medication. Tr. 31.

23 The ALJ gave "some weight" to Dr. Duris' July 2011 evaluation. Tr. 30.
24 The ALJ reasoned that Dr. Duris "placed undue reliance upon [Plaintiff's]
25 subjective complaints . . . in a setting where he was being evaluated for the specific
26 purpose of [whether he was entitled to State benefits]." Tr. 30. The ALJ found Dr.
27 Duris' opinion that Plaintiff could only work with some employer accommodation
28 inconsistent with Dr. Duris' assessment of only mild and moderate cognitive

1 limitations. Tr. 30 (citing Tr. 452).

2 The ALJ did not err in rejecting Dr. Duris' February 2011 evaluation.
3 Inconsistency with the majority of objective evidence is a specific and legitimate
4 reason for rejecting physician's opinions. *Batson*, 359 F.3d at 1196. As noted by
5 the ALJ, in contemporaneous medical records, Plaintiff's treating sources noted
6 that his mental health impairments were stable and Plaintiff reported being okay.
7 Tr. 285, 353, 397, 399, 448. Furthermore, the ALJ noted Dr. Duris' opinion that
8 Plaintiff's medications controlled his symptoms to the point that Plaintiff's
9 "[d]epression and anxiety do not appear to keep [Plaintiff] from having sufficient
10 energy, motivation, and concentration to function in a work environment at this
11 time." Tr. 346. The fact that a condition can be remedied by medication is a
12 legitimate reason for discrediting an opinion. *Warre v. Comm'r of Soc. Sec.*
13 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). The ALJ gave specific and
14 legitimate reasons for rejecting Dr. Duris' February 2011 evaluation.

15 Regarding Dr. Duris' July 2011 evaluation, the ALJ partially erred in giving
16 the opinion little weight. The ALJ erred in using the fact that Plaintiff sought Dr.
17 Duris' evaluation for purpose of obtaining benefits as a reason to discount Dr.
18 Duris' opinion. *See Lester*, 81 F.3d at 832 ("[T]he purpose for which medical
19 reports are obtained does not provide a legitimate basis for rejecting them."). The
20 ALJ partially erred in finding Dr. Duris' evaluation internally inconsistent. Dr.
21 Duris concluded that Plaintiff was capable of working only with employer
22 accommodation for "mood and behavioral related symptoms." Tr. 452. Dr. Duris
23 failed to explain how Plaintiff's "mood and behavioral symptoms," Tr. 452,
24 affected his ability to understand, remember, and persist in tasks following
25 complex instructions. Indeed, no other medical source found Plaintiff moderately
26 limited in this respect and Plaintiff reported that his impairments did not
27 significantly affect his ability to follow instructions. Tr. 227, 255. The ALJ did
28 not err in finding Plaintiff's ability to understand, remember, and persist in tasks

1 following complex instructions internally inconsistent with Dr. Duris' opinion that
2 Plaintiff could work with accommodation. But Dr. Duris' finding that Plaintiff
3 was moderately limited in his ability to communicate and perform effectively in a
4 work setting with public contact is consistent with Dr. Duris' conclusion that
5 Plaintiff could only work with accommodations. Furthermore, both Drs. Mee and
6 Gardner assessed a similar limitation. *See* Tr. 136, 154.

7 On remand, the ALJ should incorporate into his RFC determination Dr.
8 Duris' opinion that Plaintiff is moderately limited in his ability to communicate
9 and perform effectively in a work setting with public contact. The ALJ should also
10 include this limitation in his hypothetical question(s) to the VE.

11 **4. John Hoyer, M.Ed., LMHC**

12 Generally, the ALJ should give more weight to the opinion of an acceptable
13 medial source than to the opinion of an "other source," such as a therapist. 20
14 C.F.R. § 416.913(d). An ALJ is required, however, to consider evidence from
15 "other sources," 20 C.F.R. § 416.913(d); S.S.R. 06-03p, "as to how an impairment
16 affects a claimant's ability to work," *Sprague*, 812 F.2d at 1232. An ALJ must
17 give "germane" reasons to discount evidence from "other sources." *Dodrill v.*
18 *Shalala*, 12 F.3d 915 (9th Cir. 1993). Germane reasons to discount an opinion
19 include contradictory opinions and lack of support in the record. *Thomas*, 278 F.3d
20 at 957.

21 Mr. Hoyer completed a psychological/psychiatric evaluation of Plaintiff on
22 March 12, 2010. Tr. 356-61. Mr. Hoyer observed Plaintiff having symptoms of
23 many mental disorders including mood swings relating to depression and mania,
24 social withdrawal, physical complaints, suicidal trends, thought disorder indicated
25 by hallucinations, and anxiety. Tr. 357. Mr. Hoyer diagnosed Plaintiff with
26 "Bipolar DO MRE Mixed with psychotic symptoms" and physical impairments
27 including fibromyalgia, sciatica, hypertension, and GI problems. Tr. 358. Mr.
28 Hoyer found Plaintiff's impairments would cause a number of moderate and

1 marked limitations in areas of cognitive and social functioning. Tr. 359. Mr.
2 Hoyer opined that the degree of Plaintiff's functional limitations would be
3 "unpredictable" and would vary depending on Plaintiff's "sleep, sudden mood
4 swings, triggers, stress, hal[l]ucinations[,] and overall physical pain." Tr. 359. Mr.
5 Hoyer was unsure if mental health treatment could restore or substantially improve
6 Plaintiff's ability to work. Tr. 360.

7 The ALJ did not mention or discuss Mr. Hoyer's opinions. This was an
8 error as an ALJ is required to consider the opinions of "other" sources. 20 C.F.R.
9 § 416.913(d). On remand, the ALJ should evaluate Mr. Hoyer's opinions.

10 The Court notes that there are several reasons why the ALJ might give little
11 weight to Mr. Hoyer's opinions. For instance, Mr. Hoyer is not an acceptable
12 medical source and his opinions were made almost a year prior to Plaintiff's
13 alleged onset date (as amended by Plaintiff's counsel). Furthermore, the only
14 mental impairment Mr. Hoyer diagnosed was bipolar disorder. Tr. 358. The ALJ
15 did not find bipolar disorder to be a severe impairment at step, a finding Plaintiff
16 does not appear to contest. As found by the ALJ, Tr. 24-25, there is ample
17 evidence to support that Plaintiff's bipolar disorder is not severe. *See* Tr. 76 (Dr.
18 Cools opining that bipolar diagnosis unsupported as Plaintiff did not have
19 "significant hyper manic episodes"), 473 (Dr. Burdge opining that Plaintiff's mood
20 fluctuations more likely stem from past substance abuse and his personality
21 disorder than from bipolar disorder).

22 **B. Step Four**

23 Plaintiff argues that the ALJ erred by not including all of Plaintiff functional
24 limitations in the ALJ's RFC determination and by finding Plaintiff capable of
25 performing his past relevant work (PRW). ECF No. 14 at 17-19.

26 A claimant's RFC is "the most [a claimant] can still do despite [her]
27 limitations." 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P,
28 Appendix 2, § 200.00(c) (defining RFC as the "maximum degree to which the

1 individual retains the capacity for sustained performance of the physical-mental
2 requirements of jobs.”). In formulating a RFC, the ALJ weighs medical and other
3 source opinions and also considers the claimant’s credibility and ability to perform
4 daily activities. *See, e.g., Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226
5 (9th Cir. 2009).

6 In this case, the ALJ found Plaintiff had the RFC to perform light work
7 subject to the following:

8 He has some limitations with use of the right upper extremity, with no
9 more than frequent pushing and/or pulling; no more than occasional
10 overhead reaching; and no more than frequent handling and fingering
11 with the right hand. He can frequently climb ramps or stairs, but no
12 climbing ladders, ropes, or scaffolds. He can occasionally stoop or
13 crawl, and frequently kneel or crouch. He should avoid concentrated
14 exposure to extreme cold, vibration, or hazards such as machinery and
15 heights. He has a moderate limitation in the ability to maintain
attention and concentration for extended periods [and a number of
mild non-exertional limitations].

16 Tr. 27 (footnote omitted).

17 Based on the discussion *supra*, the Court concludes that the ALJ’s RFC
18 determination does not include all of Plaintiff’s non-exertional limitations that are
19 supported by substantial evidence. On remand, the ALJ should include the
20 following limitations in his RFC determination:

- 21 • Plaintiff is moderately limited in his ability to maintain appropriate
22 behavior in a work setting. *See* Tr. 136, 153, 474;
- 23 • Plaintiff is moderately limited in his ability to complete a normal
24 workday and workweek without interruptions from psychologically
25 based symptoms. *See* Tr. 136, 153, 474; and,
- 26 • Plaintiff is moderately limited in his ability to communicate and perform
27 effectively in a work setting with public contact. *See* Tr. 136, 153, 452.

28 Plaintiff argues that the ALJ should have found Plaintiff more limited in his

1 ability to handle and finger in his right hand. ECF No. 14 at 18. There is
2 conflicting evidence concerning the severity of Plaintiff's ability to handle and
3 finger with his right hand. *Compare* Tr. 134 (right hand limited to "occasional"
4 fingering and manipulation) *with* Tr. 151 (right hand limited to "freq[uent]"
5 fingering and manipulation). The ALJ resolved the ambiguity by including in his
6 RFC determination that Plaintiff was limited to "no more than frequent handling
7 and fingering with the right hand." Tr. 27. Plaintiff fails to show that the ALJ
8 erred in making this finding.

9 Plaintiff further argues that, based on the testimony of Dr. Francis, the ALJ
10 should also include a limitation that Plaintiff is unable "to reach at and above
11 shoulder height." ECF No. 14 at 18 (citing Tr. 27, 88). But Dr. Francis' testimony
12 is not conclusive on this limitation and Plaintiff cites to no other evidence
13 supporting it. Plaintiff fails to show that the ALJ erred in not including the
14 limitation that Plaintiff is unable to reach at and above shoulder height. *See Lester*,
15 81 F.3d at 831 (opinion of a medical expert does not constitute substantial
16 evidence if the opinion is not supported by evidence in the record).

17 On remand, the ALJ shall incorporate the non-exertional limitations
18 discussed *supra* into his RFC determination, as well as any other limitations the
19 ALJ finds supported by substantial evidence. With the incorporation of additional
20 moderate, non-exertional limitations, it will be necessary for the ALJ to elicit
21 testimony from a VE.³

22
23 ³The parties dispute whether the ALJ erred by not eliciting the testimony of
24 a VE. ECF No. 14 at 19; ECF No. 15 at 12-13.

25 Generally, a VE's testimony is necessary "[w]hen a claimant's non-
26 exertional limitations are 'sufficiently severe' so as to significantly limit the range
27 of work permitted by the claimant's exertional limitations." *Burkhart v. Bowen*,
28 856 F.2d 1335, 1340 (9th Cir. 1988) (quoting *Desrosiers v. Sec'y of Health &*

1
2 *Human Servs.*, 846 F.2d 573, 577 (9th Cir. 1988)); *see also* SSR 83–14 (VE
3 testimony also necessary “[w]here the adjudicator does not have a clear
4 understanding of the effects of additional limitations on the job base.”).

5 In this case, it is not entirely clear whether VE testimony was necessary.
6 The only non-exertional limitation found by the ALJ was a moderate limitation in
7 Plaintiff’s ability to “maintain attention and concentration for extended periods.”
8 Tr. 27. At least one court has suggested that the presence of a similar limitation
9 necessitates VE testimony. *See Cavanaugh v. Colvin*, 2014 WL 7339072, at *5
10 (D. Ariz. Dec. 23, 2014) (holding that “a moderate limitation in pace is sufficiently
11 severe to require the testimony of a VE” and noting that “the Grids do not
12 adequately account for a moderate deficiency in concentration, persistence, or
13 pace”). But the Court need not resolve this issue or determine whether the ALJ
14 erred by not eliciting the opinion of a VE in this case. As discussed *supra*, the
15 Court concludes that the ALJ erred by not including a number of other moderate
16 non-exertional limitations in his RFC determination. Given the number of
17 moderate limitations the Court finds supported by substantial evidence, there is
18 little doubt that Plaintiff’s combined non-exertional limitations “significantly
19 limit[s] [his] range of work.” *Burkhart*, 856 F.2d at 1340. On remand, the ALJ
20 shall elicit the opinion of a VE to determine if Plaintiff can perform his PRW or
21 other jobs that exist in significant numbers in the national economy.

22 On a final note, the Court is not entirely persuaded by Defendant’s reliance
23 on *Hoopai v. Astrue*, 499 F.3d 1071 (9th Cir. 2007) to argue that “the mere
24 presence of a nonexertional limitation does not mandate use of a vocational
25 expert.” ECF No. 15 at 12-13. A number of courts, including courts within this
26 district, have interpreted the Ninth’s Circuit’s *Hoopai* decision much more
27 narrowly. *See, e.g., Wright v. Astrue*, 2010 WL 2294533, at *5 (E.D. Wash. June
28 4, 2010) (noting that the *Hoopai* court “determined that a finding of mild to

REMEDY

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAlliser v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the medical evidence were properly evaluated. Further proceedings are necessary for the ALJ to evaluate Mr. Hoyer’s opinions and to incorporate the non-exertional limitations discussed *supra* into his RFC determination (as well as any other limitations the ALJ finds supported by

moderate depression at step two was not a nonexertional limitation requiring testimony from a [VE] [at step five]”). The Court need not determine *Hoopai*’s application to this particular case as the issue of whether VE testimony was necessary is essentially moot given the fact that remand is necessary for a variety of reasons.

substantial evidence). The inclusion of additional non-exertional limitations in Plaintiff's RFC will require the testimony of a VE to determine whether Plaintiff is capable of performing his PRW or other work.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is supported not supported by substantial evidence and based in part on legal error. On remand, the ALJ shall evaluate Mr. Hoyer's opinions. The ALJ shall also formulate a new RFC determination consistent with this opinion, and if warranted, elicit the testimony of a medical expert to assist the ALJ in making such a determination. The ALJ shall present the new RFC assessment to a VE to determine if Plaintiff is capable of performing his PRW or any other work existing in sufficient numbers in the national economy. Accordingly,

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.
 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**, and the matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.
 3. Application for attorney fees may be filed by separate motion.
- The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff** and the file shall be **CLOSED**.

DATED July 21, 2015.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE